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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS PEREZ, Defendant and Appellant.	B284668 (Los Angeles County Super. Ct. No. GA078620)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared Moses, Judge. Judgment of conviction affirmed; sentence vacated and remanded for further proceedings.

C. Matthew Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Juan Carlos Perez of first degree murder, with firearm enhancements. Perez contends: (1) the trial court erred by denying his nonstatutory motion to dismiss the information, based on his purported mental incompetence at the preliminary hearing; (2) the evidence was insufficient to prove the murder was premeditated and deliberate; (3) the trial court erred by admitting and excluding evidence related to firearms toolmark comparison; (4) the prosecutor committed prejudicial misconduct during argument; and (5) the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancements in light of Senate Bill No. 620's amendment of Penal Code section 12022.53.[1] We order the judgment of conviction affirmed, but order Perez's sentence vacated and the matter remanded for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

(i) *The murder*

On November 21, 2009, appellant Perez attended a baby shower. Also in attendance were the victim, Noe Martinez,[2] Noe's son, Ludbi Martinez, and Ludbi's wife. Ludbi and Perez were friends. Perez and Noe had been drinking together that day prior to the baby shower, and they drove to the party together. Noe

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[1] All further undesignated statutory references are to the Penal Code.

[2] Where witnesses share the same surname, for ease of reference, and with no disrespect, we sometimes hereinafter refer to them by their first names.

continued to drink at the baby shower. Noe and Perez conversed at the baby shower, and there did not appear to be any animosity between them. At approximately 11:00 p.m., Ludbi and his wife told Noe it was time to go home. He was "really drunk" at that point. Noe protested that he wanted to go with Perez to the El Salvadoreno restaurant. Ludbi tried to persuade him to go home, but Perez stood between them and declared that Noe was going with him.

Perez and Noe arrived at El Salvadoreno between 11:30 p.m. and midnight. There, they encountered Marlon Berganza and Marvin Gonzalez. Noe was acquainted with Berganza; they had worked at the same company. Noe and Perez began drinking with Berganza's group. At one point, Berganza pointed out an attractive woman who was wearing a short skirt. Perez threw a napkin at the woman's male companion. Berganza told him to calm down so there would be no trouble. Perez leaned close to Berganza and told him not to worry because he had his "cohete," i.e., gun, with him. During the evening there was no argument between the men, and everything seemed peaceful. Noe, however, was so drunk that he was swaying from side to side. By the end of the evening, he was "super drunk." According to Berganza, Noe was "always an affectionate drunk." He kept hugging Berganza and thanking him for his job. Perez also drank at the restaurant, but did not appear to be drunk.

At approximately 2:00 a.m. the next morning, November 22, Perez, Noe, Berganza, and Gonzalez left the restaurant and lingered for ten to fifteen minutes in the parking lot. By that point, Noe could "barely walk," was having difficulty speaking, and was wearing his jacket inside out. Perez tried to convince

Berganza and Gonzalez to go to another bar, but they declined and left Noe and Perez in the parking lot.

At 4:17 a.m. that morning, South Pasadena Police Department Officer Myles Fowlis was on routine patrol when he observed Perez's Toyota parked on Arroyo Drive in South Pasadena. The vehicle's windows were heavily fogged up with condensation. Fowlis pulled his patrol vehicle alongside the Toyota, illuminated the car with his spotlight, and rolled down his passenger side window. Perez, who was seated in the Toyota's driver's seat, partially lowered his window. Fowlis asked Perez what was going on. Perez said something in Spanish about his girlfriend. Fowlis parked behind the Toyota. As he approached, Perez exited the Toyota and faced Fowlis. He was wearing gloves, which appeared to be bloody. Before Fowlis could give any commands, Perez fled into the arroyo, which was covered with heavy brush.

Fowlis immediately radioed to report Perez's flight and then checked the Toyota's interior. Noe was seated in the front passenger seat, dead. He had been shot twice in the head.

(ii) *Perez's flight and apprehension*

Perez lived in an apartment on Edloft Avenue in Los Angeles. Israel Celada, whose sister was married to Perez's father, lived in an apartment in the same building on Edloft and was acquainted with Perez. At approximately 6:20 that morning, when Celada was in his car about to leave for work, Perez got in Celada's car and said he wanted a ride. He looked nervous and troubled, and appeared to be crying. He had a small plastic bag in his hands. Celada dropped Perez at a bus stop. When Perez exited the car, he told Celada that he would not see him again, and said "I put you in charge of my child."

Meanwhile, Alaska, a bloodhound, tracked Perez's scent over an equestrian trail and surface streets to an area near Perez's apartment, which was four miles from the murder scene.

On February 18, 2010, Orange County Sheriff's Deputy Mark Froome was dispatched to investigate a road rage incident, during which one of the drivers reportedly displayed a gun. At the designated location, Froome contacted Perez, who was seated in the driver's seat of a parked vehicle. Perez gave Froome a Mexican consular identification card that bore someone else's name.[3] When Perez's passenger distracted Froome, Perez fled into a nearby house, despite the occupant's attempts to bar his entry. Froome gave chase, struggled with Perez, and pointed his firearm at him when he thought Perez was pulling a gun; however, Froome backed off because there were several small children in the house. Perez fled out the back door.

A police dog named Kilo located Perez in a metal shed in the backyard of a nearby home. After a struggle, officers pulled Perez from the shed. In the corner where he had been hiding was a live nine-millimeter Luger bullet, a glass methamphetamine pipe, and a baggie containing a white crystalline substance. Everything else in the shed was covered with dust; these items were not.

Perez was booked under the false name he had given Officer Froome. He was released on bail and fled to Illinois. In July 2010, a bail enforcement agent located and detained him, after Perez put up a fight. Perez was transported back to California.

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[3] The owner of the identification card testified that he had lost the card in October 2008.

(iii) *The investigation*

Noe had suffered two gunshot wounds to the head. One bullet entered behind his left ear, going from left to right, and penetrated his brain. The other shot penetrated the back of his head, into the brain, with a slight downward angle. The shots were fired from close range, probably less than six inches. Each was independently fatal. They were not self-inflicted. The sequence of the shots was unknown. There was no other physical trauma to Noe's body, such as fresh bruises or other wounds. There were no defensive wounds. Noe's blood alcohol level at the time of his death was two to three times over the legal limit.

The Toyota in which Noe's body was found was registered to Perez. Perez's fingerprints were found on the rear driver's side panel and the trunk lid. Noe's wallet, which contained $35, and a small ring, was still on his body.

Two spent nine-millimeter shell casings, or cartridge cases, were found in the rear passenger seat of Perez's Toyota. When a nine-millimeter semiautomatic gun is fired, the cartridge case usually ejects to the right. Phil Teramoto, a senior criminalist employed with the Los Angeles County Sheriff's Department Scientific Services Bureau, compared the two spent cartridges found in the back seat and determined they had been fired from the same gun. One of the bullet fragments recovered from Noe's body was consistent with being fired from a nine-millimeter gun.[4] Teramoto also compared "magazine lip marks" on the live cartridge found in the shed with marks on one of the expended

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[4] The other fragment's condition precluded an accurate comparison.

cartridge cases and determined the live bullet had been cycled or fed through the same magazine. [5]

Noe's blood was found on, inter alia, the exterior driver's side door, interior driver's side door pull, steering wheel, window crank, turn signal lever, and driver's side seat belt buckle. A bloody stain on the exterior trunk had a textured pattern, consistent with a glove print.

Ludbi testified that Perez was "always armed" with a gun. Approximately a month before the murder, Ludbi observed Perez with a black nine-millimeter gun at a soccer game. Celada had twice seen a black, semiautomatic pistol in Perez's waistband. About a month before the murder, Hugo Rebolorio, who shared the Celada family's apartment, was on his way to work at approximately 4:00 a.m. when Perez—whom he barely knew—approached him from behind, said "hey, Buddy," and pointed a black, nine-millimeter semiautomatic pistol at him.

b. *Defense evidence*

Firearms expert John Nixon disagreed with Teramoto's conclusion that the bullet found in the shed was cycled through the same gun as one of the casings found in the Toyota.[6] In his opinion, magazine lip mark analysis was very uncommon.

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[5] Teramoto explained that a magazine holds the live rounds of ammunition in the gun, and the magazine "lips" hold the bullets in place until they are fired or removed. Marks from the magazine lips can sometimes be left on a bullet when the bullet is loaded, physically removed, or fired.

[6] We discuss Nixon's testimony in more detail where relevant, *post*.

A retired chief medical examiner testified that the two shots that killed Noe were fired in rapid succession and targeted his head. They were likely fired from less than an inch away. There was hemorrhaging around both wounds, indicating the first shot did not immediately kill Noe, but rendered him unconscious. However, either gunshot would have resulted in death "pretty quickly" and there "wasn't any significant time gap between the two." If there had been a delay of, for example, 20 minutes between the shots, there would have been no hemorrhaging around the second wound. Noe had no defensive wounds.

Kenneth Moses, the director of a private crime laboratory, testified that a gunshot wound to the head will create an aerosol spray of blood that will spray back toward the shooter in a fan-like pattern. The blood spray would get on the shooter's hand. In his opinion, the shots that killed Noe could have come from the driver's seat or the back seat.

c. *People's rebuttal*

James Carroll, the Assistant Crime Laboratory Director for the Los Angeles County Sheriff's Department, testified that magazine lip mark comparisons were commonplace. He disagreed with Nixon's conclusion that the comparison between the live cartridge and the spent cartridge case was inconclusive.

2. *Procedure*

A jury convicted Perez of first degree murder (§ 187, subd. (a)), and found he personally and intentionally used and discharged a firearm, causing Noe's death (§§ 12022.53, subds. (b), (c), (d)). The trial court sentenced him to 25 years to life for the murder, plus 25 years to life for the section 12022.53, subdivision (d) firearm enhancement, for a total of 50 years to

life.[7] It imposed a $10,000 restitution fine (§ 1202.4, subd. (b)), a suspended parole revocation restitution fine in the same amount (§ 1202.45), a $40 court operations assessment (§ 1465.8, subd. (a)(1)), and a $30 criminal conviction assessment (Gov. Code, § 70373). He timely appealed.

DISCUSSION

1. *Nonstatutory motion to dismiss the information*

Approximately three and one half years after his preliminary hearing, Perez moved to set aside the information pursuant to *People v. Duncan* (2000) 78 Cal.App.4th 765 (*Duncan*) on the ground he was mentally incompetent when the preliminary hearing transpired. After an evidentiary hearing, the trial court denied Perez's motion. Perez contends the court's ruling was not supported by substantial evidence. He is incorrect.

a. *Additional facts*

Perez's preliminary hearing took place in February 2012, and he was held to answer on February 9, 2012. Neither defense counsel nor the court declared a doubt about his competence at that time. On February 23, 2012, Perez appeared in court and entered a plea of not guilty. Again, neither the court nor defense counsel expressed a doubt about his competence.

Approximately one year later, on February 15, 2013, defense counsel declared a doubt about Perez's competence, based on reports from three mental health professionals, Timothy D. Collister, Antonio E. Puente, and Arthur P. Kowell, who evaluated Perez at counsel's request in September 2011, May

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[7] The court stayed the section 12022.53, subdivision (b) and (c) enhancements pursuant to section 654.

2012, and November 2012 (Collister), June 2012 (Puente), and October 2012 (Kowell). All three concluded Perez was not competent to stand trial. Kowell opined that Perez was mildly mentally retarded, had a mild learning disability, and had suffered past head injuries. Puente opined that Perez was mildly mentally retarded, had a mild brain injury, and a mild learning disability. Collister did not conclude Perez was incompetent after their first three meetings, but recommended a neuropsychological evaluation. In his November 28, 2012 evaluation, Collister concluded Perez was incompetent due to a cognitive disorder based on the Kowell and Puente reports, and on Perez's performance on the MacArthur Competence Assessment Tool, which involved a structured interview regarding criminal proceedings.

The trial court ordered proceedings suspended and Perez housed at Patton State Hospital. Perez was committed there on May 28, 2013. A June 14, 2013 report from Patton State found Perez was incompetent, based on the Collister, Kowell, and Puente evaluations and on Perez's statements that he had memory problems, had suffered past head injuries, and had auditory and visual hallucinations.

In a July 23, 2013 report, Patton State staff found Perez competent. The report explained that the hospital's initial finding of incompetence was based in part on the Collister, Kowell, and Puente evaluations, as well as Perez's reports of hallucinations and his purported confusion and ignorance about his court case. After observing Perez for a week, however, Perez's treatment team ordered that he be evaluated for malingering.

After providing a thorough and detailed summary of the testing and observations that underpinned its conclusions, the

report stated: "Mr. Perez is fully able to understand the nature of his charges and related legal procedure. There is no present evidence of authentic irrational or disorganized thought processes or experiences, nor any legitimate cognitive deficiencies, that would represent an obstacle to Mr. Perez's full ability to comprehend his forensic situation, related legal options, and potential implications. The ostensible ignorance, confusion, or loss of memory related to these matters have been ruled out as inauthentic . . . through observation of his actual functional capacity, and most reliably through . . . neuropsychological and malingering testing. As described in this report, these assessments ruled out that there is a truly debilitating cognitive impairment present, and they detected, repeatedly, a deliberate intention by Mr. Perez to feign cognitive impairment. As such, there is no evidence to suggest" incompetence. The report continued: "Mr. Perez is fully able to rationally cooperate with an attorney in preparation and presentation of a defense, and in any related discussion regarding his present legal case. He is considered to be asymptomatic, and his endorsed cognitive pathology has been ruled out to be exaggerated, presumably as an attempt to avoid or delay prosecution given the serious potential consequences he is facing. There is no evidence of true psychosis, mood impairment, or debilitating cognitive deficiencies that would hinder his ability to rationally and meaningfully assist counsel if he was so inclined, and even if there was some genuine cognitive limitation present, his demonstrated functional capacity during his hospitalization reveals that it does not hamper [his] ability required for competency."

At a November 22, 2013 hearing, the court indicated it had received a new, November 16, 2013 letter from Dr. Puente

opining that Perez was incompetent and suggesting he be referred to a different facility. The court ordered Perez returned to a hospital for treatment.[8]

In a July 17, 2014 report, Patton State Hospital staff again opined that Perez was malingering. On July 23, 2014, the hospital certified that Perez was competent. Counsel contested the hospital's conclusion and continued to declare a doubt. The trial court ordered that criminal proceedings remain suspended.

On November 21, 2014, the court held a competency hearing. The parties submitted on the existing reports detailed above. The trial court found Perez competent and reinstated proceedings. It found the July 23, 2013 Patton State Hospital report most persuasive, reasoning, "they had . . . almost two months to observe him and they had reached the opinion that he is competent, that he is in fact malingering. [¶] And I don't find anything in the other documents that is nearly as conclusive or powerful than this."

In August 2015, Perez brought a nonstatutory motion to dismiss or set aside the information based on his contention he had been incompetent when the preliminary hearing was held. At that hearing, the trial court considered the following testimony and materials.

Dr. Kowell testified that, in his opinion, Perez had not been competent at the February 2012 preliminary hearing. Kowell relied on his October 10, 2012 examination of Perez, during which he had administered two competence tests related to court

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[8] The court ordered Perez sent to Metropolitan State Hospital but, because that facility could not accept him, he was transferred back to Patton State Hospital.

processes. Perez's scores indicated "significant impairment." Kowell did not administer a test used to detect malingering, but Puente had done so, and detected no malingering. Kowell did not examine records from Patton State Hospital. His analysis did not consider Perez's ability to function adequately in the outside world. Kowell concluded that Perez had suffered multiple incidents of head trauma during his life, resulting in concussions, which could have a "lasting effect." He had mild mental retardation, a mild learning disability, episodic alcohol abuse, and episodes of dizziness and loss of consciousness. An MRI did not show any developmental brain malformation. In addition to the competency tests, Kowell's opinion was based on the reports written by doctors Puente and Collister.

The defense also presented a letter from Dr. Puente opining that on the preliminary hearing dates, Perez was "intellectually, neurologically, neuropsychologically impaired" and was not competent to stand trial, based on his prior analyses.

Dr. Jose Fuentes testified for the People, and also submitted a written report. Fuentes met with Perez twice, in March and April of 2016. On the first occasion, Fuentes obtained Perez's background and social history. Among other things, Perez was able to hold a variety of jobs; financially support one of his children born out of wedlock; carry on relationships with several women, including, in once instance, carrying on and concealing an affair; arrange travel to and from Mexico without assistance; manage his own finances; save money to finance his trips to Mexico; obtain a Mexican driver's license; and write letters to his girlfriend while in jail. His social history demonstrated "a consistently high level of planning, organization,

and such that is really inconsistent with someone with mild mental retardation."

Testing previously completed by Dr. Puente showed Perez's reading comprehension was in the lower average range, and his reading and writing was in the average range. When Fuentes advised Perez of informed consent information at the start of the meeting, Perez was able to paraphrase the information back to Fuentes. Perez was also able to listen to instructions and follow them.

At the second meeting, Fuentes intended to administer a battery of competency tests to Perez. As soon as Fuentes told Perez he was going to administer tests, Perez's speech slowed, he began to slur his words, and he asked Fuentes to repeat instructions, behavior that was in "stark contrast" to his previous demeanor. In light of the Patton State records, Fuentes determined to administer three "tests of effort" geared to detect malingering. Perez failed all three. Perez's results were below the cut-off for credible effort, meaning that individuals with mild mental retardation, schizophrenia and traumatic brain damage would have scored better. Fuentes concluded Perez was malingering. In light of the effort test results, Fuentes did not administer the battery of competence tests because any results would have been invalid due to Perez's malingering.

Fuentes saw no indication Perez was responding to internal stimuli such as auditory or visual hallucinations. However, when it became obvious Fuentes was terminating the session without administering the stack of tests in front of him, Perez stated he was not feeling well and was hearing voices. Based on Perez's lack of effort in testing and his life history, Fuentes questioned

the conclusion he was incompetent. In Fuentes's opinion, Perez was not intellectually disabled.

After considering all the reports and the evidence presented at the hearing, the trial court denied the motion to set aside the information. It reasoned it had before it "experts with differing opinions," and the court was required to make a "credibility call." Based on the Patton State Hospital reports and Dr. Fuentes's testimony and report, which the court found more credible than the contrary information presented, the court concluded Perez had failed to meet his burden to show incompetence. The court found the Patton reports particularly persuasive because staff there had an opportunity to observe Perez over an extended period. The court concluded the Patton and Fuentes reports "seriously undermine[d]" the other experts' opinions.

b. *Discussion*

Perez contends the trial court's ruling was not supported by substantial evidence. He is incorrect.

"Conducting a preliminary hearing when the defendant is mentally incompetent violates his right to due process of law." (*Duncan*, *supra*, 78 Cal.App.4th at p. 772; see *People v. Smith* (2003) 110 Cal.App.4th 492, 499 [trial of an incompetent defendant violates the defendant's due process rights]; § 1367, subd. (a).) A defendant is mentally incompetent if, as a result of a mental disorder or developmental disability, he or she is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (§ 1367, subd. (a); *People v. Halvorsen* (2007) 42 Cal.4th 379, 401; *People v. Smith*, at p. 499.)

When a defendant is denied a substantial right at the preliminary hearing, the ensuing commitment is illegal, and the defendant is entitled to dismissal of the information upon timely motion. (*Duncan*, *supra*, 78 Cal.App.4th at p. 772; *Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1144.) Where a defendant's incompetence at the preliminary hearing does not come to light until after its completion, a defendant may bring a nonstatutory motion to dismiss the information. (*Duncan*, at pp. 772—773; cf. *Harris v. Superior Court*, at p. 1144.) The defendant has the burden to overcome the statutory presumption of competence by a preponderance of the evidence. (§ 1369, subd. (f) [defendant is presumed competent]; *Duncan*, at p. 773; *People v. Smith*, *supra*, 110 Cal.App.4th at p. 504.) We uphold the trial court's ruling if its findings are supported by substantial evidence. (*Duncan*, at p. 774.)

Here, there was ample evidence to support the trial court's decision. The Patton reports concluded Perez did not suffer from cognitive defects or mental retardation. He did not actually experience auditory or visual hallucinations. Brain imaging showed no evidence of brain damage. His claims of ignorance, confusion, and amnesia regarding his court case were inconsistent with his ability to function appropriately, and thus were inauthentic. His observed behavior at the hospital, and his extremely poor performance on malingering tests, indicated he was deliberately attempting to underperform. The report was replete with concrete examples demonstrating his unimpaired functioning at the hospital: he expressed himself clearly and coherently, indicating an "organized and rational mind," socialized adaptively, fraternized "fluidly (and charmingly) with female patients," kept appointments, managed his daily routine,

discussed "colorful and accurate memories" of cities he had visited and former girlfriends, and recalled and conversed about past and current soccer competitions, players' names and schedules, scores and standings. Dr. Fuentes's report confirmed the Patton analysis, indicating that Perez's purported cognitive deficits were inauthentic and the result of his malingering. The evidence was thus sufficient to prove Perez was not actually mentally retarded or cognitively impaired, the bases upon which the defense experts based their incompetence findings. Thus, the People's evidence disproved the defense experts' conclusions.

Perez contends the evidence was insufficient because the Patton reports and Fuentes's opinion did not pertain to his mental state in February 2012. He argues that a showing he was competent in July 2013 was not sufficient to show he was competent in February 2012, when the preliminary hearing was held. But, under Perez's approach, the reports and conclusions of his own experts were equally inadequate. Although Kowell and Puente opined Perez's incompetence existed in February 2012, their conclusions were based on evaluations conducted months later. Collister evaluated Perez in September 2011 and May 2012, but did not, at that point, conclude Perez was incompetent. Instead, Collister recommended further evaluation and made note of several facts suggesting Perez was not mentally retarded. No expert evaluated Perez's competence contemporaneously with the preliminary hearing. When the preliminary hearing transpired, no one—not the court and not counsel—declared a doubt about Perez's competence.

The more fundamental problem with Perez's argument is that the value of the Patton and Fuentes evaluations was not limited to July 2013 and July 2016. The defense experts

variously determined Perez was incompetent because he was mildly mentally retarded, had a cognitive defect arising from prior head injuries, or lacked sufficient understanding of the pending criminal proceedings. The Patton report concluded Perez did not have cognitive defects related to brain injuries, and was not mentally retarded. Fuentes's evaluation suggested the same. Both the Patton and the Fuentes reports concluded Perez was malingering, that is, deliberately underperforming on tests, feigning ignorance and confusion, and fabricating symptoms of mental illness in an effort to avoid or delay prosecution. Thus, the court could reasonably conclude the evidence showed Perez never was mentally retarded, never had a cognitive defect, and simply faked his confusion about legal proceedings, eviscerating the defense experts' conclusions. In sum, the trial court's ruling was supported by substantial evidence.[9]

2. *The evidence was sufficient to prove premeditation and deliberation*

Perez does not dispute that the evidence was sufficient to establish he intentionally killed Noe. However, he contends his conviction must be reversed because there was insufficient evidence of premeditation and deliberation to support the jury's first degree murder verdict. We disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable

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[9] In light of our conclusion, we need not reach the People's forfeiture argument.

trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Salazar* (2016) 63 Cal.4th 214, 242.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Booker* (2011) 51 Cal.4th 141, 172; *People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Penunuri* (2018) 5 Cal.5th 126, 142.) The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence. (*People v. Salazar*, at p. 242.) We must accept logical inferences the trier of fact might have drawn from the evidence. (*Ibid*.)

Murder is of the first degree when it is willful, deliberate and premeditated. (§ 189; *People v. Elmore* (2014) 59 Cal.4th 121, 133.) Premeditation and deliberation require more than a showing of intent to kill. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) An intentional killing is premeditated and deliberate if it is considered beforehand and occurred as the result of preexisting thought and reflection, rather than as the product of an unconsidered or rash impulse. (*People v. Pearson* (2013) 56 Cal.4th 393, 443; *People v. Burney* (2009) 47 Cal.4th 203, 235.) "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. (*People v. Pearson*, at p. 443; *People v. Williams* (2018) 23 Cal.App.5th 396, 409; *People v. Disa* (2016) 1 Cal.App.5th 654, 664.) However, to prove a killing was premeditated and deliberate, it is " 'not . . . necessary to prove the defendant maturely and meaningfully reflected upon the gravity

of his or her act.' [Citation.]" (*People v. Disa*, at p. 665.) The " ' "process of premeditation and deliberation does not require any extended period of time." ' " (*People v. Salazar*, *supra*, 63 Cal.4th at p. 245.) The true test is not the duration of time, but the extent of the reflection. " ' " 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" [Citation.]' " (*People v. Houston* (2012) 54 Cal.4th 1186, 1216.)

A reviewing court typically considers three categories of evidence when determining whether a finding of premeditation and deliberation is adequately supported: planning activity, motive, and manner of killing. (*People v. Houston*, *supra*, 54 Cal.4th at p. 1216; *People v. Anderson* (1968) 70 Cal.2d 15, 26—27; *People v. Gonzalez* (2012) 54 Cal.4th 643, 663—664.) These so-called *Anderson* factors are not all required and are not exclusive, but are a framework to guide the assessment of the evidence. (*People v. Gonzalez*, at p. 663; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294.)

Perez contends the record contains no evidence showing that he had a motive to kill Noe, planned the murder, or committed the murder in a manner suggesting premeditation. We agree that the record is silent on the question of motive; Perez killed Noe for an unknown reason or reasons. But California law "has ' "never required the prosecution to prove a specific motive before affirming a judgment, even one of first degree murder. A senseless, random, but premeditated, killing supports a verdict of first degree murder." [Citation.]' [Citation.]" (*People v. Halvorsen*, *supra*, 42 Cal.4th at pp. 421—422; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 202 [although abuse inflicted by defendant appeared senseless and

inexplicable, the lack of a discernable rational motive does not preclude a conviction for first degree premeditated murder]; *People v. Thomas* (1992) 2 Cal.4th 489, 519; *People v. Orozco* (1993) 20 Cal.App.4th 1554, 1567; *People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102 ["the law does not require that a first degree murderer have a 'rational' motive for killing"]; *People v. Solomon* (2010) 49 Cal.4th 792, 816 [motive is not an element of murder].)

Here, premeditation and deliberation were sufficiently established by the manner of killing. Our Supreme Court has long held that an execution-style killing, such as shots to a victim's head from close range, is sufficiently particular and exacting to support an inference that the defendant killed pursuant to a preconceived design. (*People v. Gomez* (2018) 6 Cal.5th 243, 283 [fact victims were shot from close range in the head or neck showed premeditation and deliberation]; *People v. Casares* (2016) 62 Cal.4th 808, 825 ["The method by which defendant killed [the victim] (a gunshot to the back of the head at very close range) was sufficiently particular and exacting to support the inference he intentionally killed him according to a preconceived design"], overruled on another ground by *People v. Dalton* (2019) 7 Cal.5th 166, 214; *People v. Cage* (2015) 62 Cal.4th 256, 277; *People v. Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 295 [close-range shooting without provocation or evidence of a struggle supports inference of premeditation and deliberation]; *People v. Thompson* (2010) 49 Cal.4th 79, 114—115 [same]; *People v. Romero* (2008) 44 Cal.4th 386, 401 [where victim was killed by a single gunshot fired from a gun placed against his head, "this execution-style manner of killing supports a finding of premeditation and deliberation when . . . there is no indication of a struggle"]; *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 422

[victims were shot in the head or neck from within a few feet, a method of killing sufficiently particular and exacting to permit inference that defendant was acting according to a preconceived design]; *People v. Stewart* (2004) 33 Cal.4th 425, 495 ["The killing was accomplished by a single execution-style shot fired from close range into the victim's forehead, in circumstances showing no evidence of a struggle. This plainly supports a finding of premeditation and deliberation"]; *People v. Marks* (2003) 31 Cal.4th 197, 230; *People v. Morris* (1988) 46 Cal.3d 1, 23 [victim was shot twice, in the head and the abdomen, from close range; "Wounds of this nature, as a result of shots fired from point-blank range, evince a calculated and deliberate design to kill, not an indiscriminate shooting in the heat of passion"], disapproved on another ground by *In re Sassounian* (1995) 9 Cal.4th 535, 543-545, fns. 5 & 6; *People v. Bloyd* (1987) 43 Cal.3d 333, 348.)

Such was the case here. Perez shot Noe twice in the head. One shot was placed behind Noe's left ear. The other was placed in the back of Noe's head. According to the defense expert, the two shots were fired point-blank, with the gun's muzzle less than an inch away from Noe's head; the People's expert estimated a range of less than six inches. The evidence showed there was no struggle or argument between the men. Noe had no defensive wounds, and there were no bruises or other signs of a struggle on his body. The jury could reasonably infer that if the men had been engaged in an argument, a struggle would have ensued when Perez pulled the gun; certainly Noe would have attempted to defend himself, flee, or block or evade the bullet's path, conduct that would have interfered with or prevented Perez from firing two shots precisely to Noe's head. Further, the evidence suggested it was unlikely Noe provoked Perez: he was extremely

intoxicated, and Berganza testified that Noe was "always an affectionate drunk," not a person who became angry or aggressive when intoxicated. (See *People v. Lunafelix*, *supra*, 168 Cal.App.3d at p. 102 [the "utter lack of provocation by the victim is a strong factor supporting the conclusion that [the attack] was deliberately and reflectively conceived in advance"].)

Indeed, courts have found an execution-style manner of killing may provide sufficient evidence of premeditation and deliberation, even in the absence of evidence showing planning or motive. The "method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro* (1995) 11 Cal.4th 786, 863—864.) In *People v. Hawkins* (1995) 10 Cal.4th 920, for example, the victim was shot twice in the back of the neck and head from close range, at an angle suggesting he might have been kneeling or crouching at the time, and little evidence suggested a struggle. (*Id.* at p. 956.) The court concluded that "although evidence of planning and motive was indeed minimal if not totally absent . . . the manner-of-killing evidence was sufficiently strong to permit a trier of fact to conclude beyond a reasonable doubt that defendant committed the . . . murder with premeditation and deliberation." (*Id.* at p. 957, disapproved on another ground by *People v. Lasko* (2000) 23 Cal.4th 101, 109—111; see also, e.g., *People v. Concha* (2010) 182 Cal.App.4th 1072, 1084—1085 ["This court has . . . concluded that an execution-style killing may be committed with such calculation that the manner of killing will support a jury finding of premeditation and deliberation, despite little or no evidence of planning and motive"]; cf. *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1269 ["Cases that have found sufficient

evidence of premeditation and deliberation in the absence of planning or motive evidence are those in which '[t]he manner of the killing clearly suggests an execution-style murder' "].) Here, the manner of killing—essentially an execution-style murder—was enough to support the jury's finding of premeditation and deliberation.

Additionally, there was some evidence of planning. When Officer Fowlis found Perez in the car with Noe's body, Perez was wearing a pair of bloody gloves. One of the defense experts testified that the gunshot would have caused aerosolized blood to emit from the wound in a fan-like pattern, causing blood to land on the shooter's hand. From this evidence, the jury could reasonably infer Perez brought the gloves with him and put them on before shooting Noe to avoid leaving his fingerprints on the murder weapon, and the gloves became bloodstained due to the aerosolized blood spray. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1253 [planning shown by evidence killer wore gloves; he "planned far enough in advance to bring gloves or socks for his hands so he would not leave fingerprints"].) And, the evidence did not provide an alternative, innocent explanation for why Perez would have brought the gloves along that evening, or why he would have donned them when driving or sitting in his vehicle in the middle of the night.

Perez argues that (1) the presence of the gloves did not show premeditation because they would not have assisted him in either carrying out the shooting or avoiding apprehension, and (2) it is unreasonable to infer he was trying to avoid leaving fingerprints when he "left other forensic evidence all over himself and the car." But, there is nothing unreasonable about the inference he wore the gloves to avoid fingerprints on the gun, as

opposed to the car. As for his second contention, certainly the jury could reason that, had Officer Fowlis not arrived when he did, Perez would have disposed of Noe's body, perhaps in the arroyo,[10] and cleaned up his car.

Planning was also shown by the fact Perez brought a gun with him in the car. (See *People v. Lee* (2011) 51 Cal.4th 620, 636 [fact defendant brought a loaded handgun on the night of the murder indicated he had considered the possibility of a violent encounter].) We agree with Perez that this evidence was not as compelling as it might have been, in light of the fact that the evidence showed he was often armed with a gun. Nonetheless, we do not think the jury was required to discount the gun evidence entirely in determining whether Perez planned the killing. And, in any event, the "lack of evidence of extensive planning does not negate a finding of premeditation." (*People v. Brady* (2010) 50 Cal.4th 547, 563.)

Perez relies on the principle that an especially brutal killing may be as consistent with an explosion of rage as with premeditation. (See *People v. Alcala* (1984) 36 Cal.3d 604, 626 ["The fact that a slaying was unusually brutal, or involved multiple wounds, cannot alone support a determination of premeditation. Absent other evidence, a brutal manner of killing is as consistent with a sudden, random 'explosion' of violence as with calculated murder"]; *People v. Nazeri* (2010) 187 Cal.App.4th 1101, 1118.) But the two gunshots in this case are not comparable to the type of injuries courts have characterized as

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[10] Officer Fowlis testified that on one side of Arroyo Drive, the street where Perez was parked, there was a "wooded," "hilly, grassy area" with "thick, very thick" brush, that went "down a very big sloping hill" to equestrian and walking paths.

brutal or frenzied. In *Alcala*, for example, the victim was " 'all cut up' " by multiple stab wounds and had been hit in the head with a blunt object; in *Nazeri*, each victim had been stabbed multiple times in the neck, torso, and other areas. (*People v. Alcala*, at p. 627; *People v. Nazeri*, at p. 1109.) The two precisely placed gunshots in the instant case were not of this ilk.

Perez's remaining arguments amount to a request that we reweigh the evidence and substitute our judgment for the jury's. The fact the evidence might have been reconciled with a contrary finding does not warrant a reversal. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890; *People v. Solomon*, *supra*, 49 Cal.4th at p. 816.) " ' "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence." [Citation.]' " (*People v. Harris* (2013) 57 Cal.4th 804, 849.)

3. *Contentions related to expert testimony regarding firearm toolmark analysis*

Perez contends the trial court erred by (1) declining to conduct a hearing pursuant to *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*)[11] before admitting evidence regarding certain firearms

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[11] Such motions have in the past also referenced *Frye v. U.S.* (D.C. Cir. 1923) 293 Fed. 1013, and have sometimes been denominated "*Kelly-Frye*" motions. (See *People v. Cowan* (2010) 50 Cal.4th 401, 469, fn. 22.) Because *Frye* has been supplanted by the Federal Rules of Evidence, we "refer here solely to *Kelly*." (*Ibid.*)

toolmark comparisons, and (2) excluding evidence purportedly showing that the " 'underlying science' of toolmark comparison is unreliable."

a. *Additional facts*

As noted, one of the People's firearms toolmark experts, Teramoto, opined that magazine "lip marks" on the unfired bullet taken from the shed where Perez was found hiding (the "shed bullet") matched marks on one of the expended cartridges found in the back seat of Perez's Toyota (the "back seat cartridge"). Prior to trial, the defense sought to exclude Teramoto's testimony on this point, or, alternatively, averred that before such testimony could be admitted, the trial court was required to hold a *Kelly* hearing to determine the reliability of lip mark comparisons.[12] Perez's theory was that, based on studies conducted over the last decade, firearms comparison evidence is not generally accepted as reliable in the scientific community.

In support of his motion, Perez offered three reports and an article that addressed various forensic analyses, including firearms toolmark comparisons,[13] as well as a declaration by the

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[12] Perez's motion stated it sought exclusion of "all testimony regarding conclusions reached based on firearms comparison" made by Teramoto. However, in his argument that the court erred by failing to hold a *Kelly* hearing, Perez addresses only the magazine lip mark evidence, not Teramoto's conclusion that the two back seat cartridges were fired from one gun. Accordingly, as to the *Kelly* hearing issue, we address only the evidence regarding the shed bullet comparison.

[13] These materials were: National Research Council of the National Academies, *Ballistic Imaging* (2008); National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009); Hon. Harry

defense expert, Nixon. These materials, considered in the aggregate, concluded or opined that: firearms examiners' assessments are subjective and dependent upon intuition, experience, training and skill, a fact acknowledged in standards promulgated by the Association of Firearms and Tool Mark Examiners (AFTE); uniqueness—i.e., whether a particular set of toolmarks can be shown to come from one weapon to the exclusion of all others—has not been proven; there is no precisely defined process or specific comparison protocol for toolmark analyses; the AFTE's theory—that an examiner may conclude two items have a common origin if their marks are in sufficient agreement—is circular because sufficient agreement is defined as the examiner being convinced the items are extremely unlikely to have a different origin; there is no statistical foundation for the estimation of error rates; and firearms analysis fails to meet the scientific criteria for foundational validity due to insufficient study. The People opposed the motion and offered various documents showing disagreement with the studies offered by the defense, including, inter alia, responses from the AFTE, the FBI, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and other organizations, criticizing or expressing disagreement with the PCAST report.

The trial court ruled that, based on *People v. Cowan*, *supra*, 50 Cal.4th 401 and other authorities, a *Kelly* hearing was not

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T. Edwards, *The National Academy of Sciences Report on Forensic Sciences: What it Means for the Bench and Bar* (2010); President's Council of Advisors on Science and Technology, *Report to the President, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016) (PCAST report).

required. Firearm toolmark analysis was not a new scientific technique. Toolmark evidence was not so foreign to everyday experience that jurors would uncritically accept an expert's conclusions; instead, jurors could see and evaluate the comparisons for themselves.

The parties also discussed limitations on the testimony of the defense and prosecution experts. Initially, the court ruled that Nixon could testify about purported flaws in Teramoto's work and could attack his analysis, methodology, and conclusions. However, the court precluded the defense from attacking "the underlying science."

Subsequently, the court modified its ruling and held the defense was entitled to "somewhat attack the . . . underlying science of [firearms toolmark analysis] without getting into" the details of the dispute between the National Academy of Sciences (NAS) (which had promulgated two of the reports offered by the defense) and the AFTE. Nixon could testify, for example, that based upon his review of studies and his experience, firearms analysts make errors; "[i]t's not a rock solid science"; and was subjective. He could also discuss the "reliability or lack of reliability inherent in this type of work." Under Evidence Code section 352, however, the court ruled that Nixon could not go into the details of the reports the defense had presented or the AFTE/NAS "dispute." Such evidence, the court reasoned, would be unduly time consuming, would tend to confuse the jury, and lacked significant probative value. Further, statements in the reports themselves were hearsay.

b. Kelly *hearing*

Perez contends that the trial court erred by failing to conduct a foundational *Kelly* hearing to determine whether the

magazine lip mark comparison evidence was reliable enough to be admissible. He asserts that this form of toolmark comparison was a new science within the meaning of *Kelly*. He points out that Teramoto testified that lip mark comparison accounted for only five to ten percent of his caseload, and Nixon testified such comparisons were very unusual. Therefore, he insists, the matter must be remanded so the trial court can hold a *Kelly* hearing.

"[T]he *Kelly* rule provides that the 'admissibility of expert testimony based on "a new scientific technique" requires proof of its reliability—i.e., that the technique is " 'sufficiently established to have gained general acceptance in the particular field to which it belongs.' " ' [Citations]." (*People v. Cowan*, *supra*, 50 Cal.4th at p. 469; *People v. Jackson* (2016) 1 Cal.5th 269, 315—316.) *Kelly* applies "only to ' "that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law." ' [Citations.]" (*People v. Cowan*, at p. 470; *People v. Jackson*, at p. 316.) The *Kelly* rule " 'is intended to prevent lay jurors from being unduly influenced by procedures which seem scientific and infallible, but which actually are not.' " (*People v. Cowan*, at p. 470; *People v. Webb* (1993) 6 Cal.4th 494, 524.) We independently review a determination that a technique is subject to *Kelly*. (*People v. Jackson*, at p. 316.)

People v. Cowan compels rejection of Perez's argument. There, a criminalist made a mold of a gun's barrel with a casting compound, compared the markings on the mold with bullets recovered from the victim's body, and concluded the bullets were fired from the gun. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 469.) At trial, the criminalist testified that neither he, nor any other ballistics expert, had ever testified about comparisons using

such castings. (*Ibid.*) *People v. Cowan* held the evidence was not subject to *Kelly*. Toolmark comparisons were not a new scientific technique. The criminalist "simply combined" two existing techniques—ballistics comparisons and toolmark identification using molds—to reach his conclusion. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 470.) Neither technique was so foreign to everyday experience as to be unusually difficult for laypersons to evaluate. (*Ibid.*) The procedure "merely 'isolate[d] physical evidence'—specifically, the pattern of lands and grooves and associated imperfections on the inside of the Colt pistol's barrel, as well as the corresponding markings on the recovered bullets—'whose . . . appearance, nature, and meaning [were] obvious to the senses' of the lay jurors." (*Id.* at p. 471.) Thus, the "reliability of the process in producing that result is equally apparent and need not be debated under' the *Kelly* rule." (*Id.* at p. 470.)

People v. Cowan rejected the argument that "although the science of ballistics is not new, the accepted technique involve[d] comparison of a test-fired bullet with bullets recovered from a crime scene," and there were "critical differences" between that technique and the identification of marks produced by dynamic forces acting on a bullet as it is fired. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 471.) The court reasoned: "the difference between static tool mark comparison and dynamic ballistics comparison was not a matter so beyond common understanding that lay jurors could not give it proper weight in evaluating [the criminalist's] opinion." (*Ibid.*)

Perez has failed to show that toolmark analysis involving magazine lip mark comparisons is qualitatively different from other firearms toolmark comparisons, which are not subject to the *Kelly* test. Both involve the same analysis: matching marks

on cartridges or bullets based on impressions left by a firearm component. That magazine lip mark comparisons are less common than other toolmark comparisons does not show this analysis amounts to a new scientific technique. "To be 'new'—both to science and to the law—'a technique must be meaningfully distinct from existing techniques. [Citation.]' " (*People v. Fortin* (2017) 12 Cal.App.5th 524, 531—532; *People v. Jackson*, *supra*, 1 Cal.5th at p. 316.)

Further, Teramoto showed photographs of the lip mark comparisons, explained the process he used to compare the two, and identified the points of similarity. The procedure he used simply isolated physical characteristics, whose appearance could be evaluated by the jury. (See *Cowan*, *supra*, 50 Cal.4th at p. 471; *People v. Webb*, *supra*, 6 Cal.4th at p. 524 [expert testimony regarding fingerprint match based on laser-derived image was not subject to *Kelly*; jury saw the "photographic result" of the expert's method]; *People v. Venegas* (1998) 18 Cal.4th 47, 81 [contrasting DNA evidence, which requires validation under *Kelly*, with "fingerprint, shoe track, bite mark, or ballistic comparisons, which jurors essentially can see for themselves"].)

Perez acknowledges that firearms toolmark evidence has generally been ruled admissible under California law. But, he argues, even if magazine lip mark analysis falls within this category, the trial court should have conducted a *Kelly* hearing because, as shown by the studies and materials he offered in support of his motion, the scientific community now has significant doubts about the reliability of firearms toolmark evidence. He argues that when a previously established forensic technique is subsequently revealed to be "junk science," re-evaluation under *Kelly* is required. (See *People v. Kelly*, *supra*,

17 Cal.3d at p. 32 ["once a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, *at least until new evidence is presented reflecting a change in the attitude of the scientific community*," italics added.)

We need not reach this claim, however, because even assuming Teramoto's testimony should have been excluded, any error was manifestly harmless. "The erroneous admission of expert testimony only warrants reversal if 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*People v. Prieto* (2003) 30 Cal.4th 226, 247; *People v. Richardson* (2008) 43 Cal.4th 959, 1001; *People v. Wilson* (2019) 33 Cal.App.5th 559, 571—572; Evid. Code, § 353, subd. (b).)

The magazine lip mark comparison evidence was offered for a single purpose: to connect Perez to the shooting, by linking him to the gun used to kill Noe. But, even if the shed bullet had never been discovered, there was overwhelming evidence Perez was the killer. Undisputed evidence showed Perez possessed a nine-millimeter gun: Ludbi and Celada had seen it, Ludbi heard Perez talk about it, and Rebolorio testified Perez pointed it at him for no apparent reason. The undisputed evidence showed Perez had the gun on the night of the murder, just hours before Noe was killed: at El Salvadoreno, Perez confided to Berganza that he had his "cohete," or gun, with him. Perez was alone with Noe at approximately 2:15 a.m. on the morning of the murder. Only two hours later, Officer Fowlis discovered Perez seated in the driver's seat of a Toyota registered to Perez, with Noe in the passenger seat, dead. Perez was wearing bloody gloves. Instead of seeking

help for Noe or providing an innocent explanation for why he had a deceased individual in his car, Perez immediately fled. A bloodhound tracked Perez to an area by his apartment, and Fowlis positively identified him. At approximately 6:30 that morning, Perez accosted his acquaintance Celada, told Celada he would not see him again, and asked him to take care of his children. Thereafter Perez fled, assumed a false name, and violently resisted apprehension.

And, all the evidence suggested Perez was the shooter. Two expended nine-millimeter cartridge casings were found in his vehicle's back passenger area. Nine-millimeter firearms generally eject cartridges to the right of the gun. This suggested the shooter was sitting in the driver's seat; the blood evidence suggested the same thing. There was not a scintilla of evidence suggesting an unidentified third party was actually the culprit. In short, the evidence that Perez was the shooter was overwhelming without any reference to the shed bullet. Had the challenged evidence been excluded, we cannot conceive that a better result for Perez would have resulted.

Perez contends that the absence of evidence of motive made the People's case weak. But the fact the shed bullet and the back seat cartridges were connected did nothing to assist the People on this score. Perez also insists that the challenged evidence must have been important in light of the prosecutor's reliance upon it, and his robust efforts to discredit the defense expert and oppose the *Kelly* motion. (See *People v. Louis* (1986) 42 Cal.3d 969, 995 [where prosecution treated evidence as important, there was no reason why the court should treat it as any less crucial], disapproved on another ground by *People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9.) But we do not read *People v. Louis* for the

proposition that whenever a prosecutor vigorously advocates for admission of evidence, we are required to assume that evidence was crucial to the People's case as it ultimately unfolded. In *Louis*, the challenged testimony was the most critical evidence in the case, and was the sole evidence identifying defendant as the "trigger man." (*Louis*, at p. 989.) The same is not true here.

c. *The trial court did not abuse its discretion by excluding evidence; any purported error was manifestly harmless*

In a related vein, Perez argues that the trial court abused its discretion by "preclud[ing] the defense from challenging the validity of toolmark examination in general—the 'underlying science' upon which the expert opinions in this case rested." He urges that the court's ruling prevented him from attacking the conclusions of the People's experts or supporting those of his own expert.

"A trial court has broad discretion to exclude relevant evidence under Evidence Code section 352 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' [Citations.] Such 'discretion extends to the admission or exclusion of expert testimony.' [Citations.] We review rulings regarding relevancy and Evidence Code section 352 under an abuse of discretion standard." (*People v. Linton* (2013) 56 Cal.4th 1146, 1181.)

An expert witness may be fully cross-examined as to the matter upon which his or her opinion is based and the reasons for his or her opinion. (Evid. Code, § 721, subd. (a); *People v. Ledesma* (2006) 39 Cal.4th 641, 695.) However, an expert "may not under the guise of stating reasons for an opinion bring before

the jury incompetent hearsay evidence. [Citation.] A trial court has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay." (*People v. Price* (1991) 1 Cal.4th 324, 416.)

We discern no abuse of discretion here. The trial court's ruling was not as constricted as Perez suggests. Perez's expert was able to testify to many, if not all, of the issues raised in the PCAST report and the other reports. Nixon testified regarding the "uniqueness" issue: he opined that firearms toolmark comparison was based on "the concept of uniqueness and it hasn't really been proven." He explained that striations or scratch marks "are potentially different for every gun, but no one's proven that they are." And, when a gun component is made with a particular tool which itself has a characteristic marking, the component will also have that characteristic marking; however, more than one gun will possess that characteristic.

Nixon also explained that firearms toolmark analysis is "very subjective" and not a science. It is "generally accepted as a subjective discipline," i.e., "it's down to the judgment of the individual examiner who's doing the examination. So not necessarily every person is going to come to the same conclusion because it's a subjective opinion." A science, by contrast, should have repeatable results. "[B]ecause this is subjective by definition, a subjective discipline is not science." In any event, there was no real dispute on this point; Teramoto testified that his work was subjective to the extent it involved his observations and comparisons. Nixon also testified to his disagreement with the notion that toolmark analysis was definitive; he opined that one could compare striations and determine it was "more likely than not" that a bullet came from a particular firearm, but saying

the two "match[ed]" was misleading. Defense counsel asked Teramoto about the error rate applicable to toolmark analysis, and elicited that Teramoto could not provide one.

Perez appears to argue that the trial court erred by prohibiting detailed examination of both Teramoto and Nixon regarding the contents of the reports attached to his pretrial motion. He contends he should have been allowed to ask the People's experts if "they were aware of the specific concerns raised in that literature, and whether they considered such concerns in forming their opinions." But, as relevant here, Evidence Code section 721, subdivision (b) prohibits cross-examination of an expert in regard to the "content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication" unless the witness "referred to, considered, or relied upon" it in forming his or her opinion. There was no showing here that Teramoto or Carroll relied upon any of the reports provided by the defense; thus, the defense could not question them about those reports. "[T]he purpose of [Evidence Code] section 721(b) is 'to prevent an adverse party from getting before the trier of fact the *inadmissible hearsay* views of an *absent* expert, which may be *contrary* to the expert witness' opinion, through the device of cross-examining the expert witness regarding the absent expert's publication or report even though the testifying expert had *not* used or considered that publication or report in *any* way in arriving at or forming his opinion testimony.' [Citation.]" (*McGarity v. Department of Transportation* (1992) 8 Cal.App.4th 677, 683.)

Even assuming arguendo that trial court's ruling was overly restrictive, Perez has not demonstrated prejudice. There is no possibility he would have achieved a better result had the

trial court's evidentiary ruling been broader. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 247; *People v. Richardson*, *supra*, 43 Cal.4th at p. 1001; Evid. Code, § 353, subd. (b).) We have explained *ante* why evidence connecting the shed bullet and one of the back seat cartridges was harmless. The only other toolmark evidence was Teramoto's conclusion that the two back seat cartridges were both fired from a single gun. Evidence that the cartridge cases were nine-millimeter—the same caliber as the gun Perez was known to carry—was not derived through toolmark analysis; the caliber was contained in the headstamp on the cartridge. Given that fact, it could not have come as a surprise to anyone that the bullet fragment removed from Noe's body was consistent with a nine-millimeter gun. That two shots were fired was obvious based on the victim's injuries. Thus, evidence that the bullets were fired from a single gun was relevant only to prove that there was a single shooter. There was overwhelming evidence on this point. No one else was in the car when Officer Fowlis arrived. There was no dispute that Noe was shot in the car, and no evidence he was killed elsewhere. The blood evidence and the location of Noe's wounds suggested the shooter was seated in the driver's seat, where Perez was observed. There was no blood in the back seat. The shots were fired in rapid succession. There was a dearth of evidence suggesting an unidentified person played some role in the murder. And, tellingly, the defense did not even contest that the back seat cartridges were fired from the same gun; Nixon was not asked to compare them. Any purported error was harmless.

4. *Prosecutorial misconduct during argument*

Perez further contends his conviction must be reversed because the prosecutor committed prejudicial misconduct during argument to the jury. We disagree.

a. *Additional facts*

During argument, the prosecutor described in detail how the shooting likely transpired, as follows: "Shots fired. A bullet enters Noe's head. [¶] As he squeezed, that car lit up with the fire. There was a bright flash. The explosion, the sound in this car must have been deafening shooting a gun off in this car. [¶] You heard that Noe would have went unconscious. You heard from their expert that Noe wasn't dead with that first shot because there was injury with the second shot. So Noe goes unconscious, there's a loud bang, and the defendant's there holding the gun. [¶] Blood begins to pour out of Noe's wound. Back flash. . . . That's that aerosol fan of blood that comes out when you shoot somebody at a close range. [¶] Noe's bleeding out. Defendant's hand and his gun are covered with blood. The smell of gun powder is inside that car. And what does he choose to do? He takes that gun, he lifts that gun up again, he points it at one specific spot, Noe's head. [¶] He eases on the trigger. The muzzle gets again within inches, and, bam, Noe Martinez is dead. Two .9-millimeter bullets pierce his brain." The prosecutor urged that the fact Perez shot Noe twice showed premeditation and deliberation because "you need to pull that gun, you need to aim that gun, you need to shoot that gun," and premeditation and deliberation were even more apparent when "after firing that weapon, you decide to fire it again." "You heard that even from defense's coroner that the first gunshot wound, whichever one it was, did not kill him. Why? Because both those gunshot wounds

had trauma around the wounds, which indicates he was still alive. Which having no trauma would indicate your blood's not flowing, you're dead. [¶] First shot knocked him unconscious. He chose to murder him. Right? [¶] Willful, deliberately, and with premeditation [in] spades in this case." During closing, the prosecutor urged, "The two shots at close range. The defense is telling you there's no evidence that this is a first degree murder. As we talked about, you can tell by the shots in this case that it is a first degree murder. [¶] Noe was not dead by the time that second shot from that man pierced his head."

b. *Contentions*

Perez contends the prosecutor "gross[ly] [m]ischaracter[ized]" the evidence by arguing that the first shot did not kill Martinez, but merely rendered him unconscious, and that "substantial time passed" between the shots. In Perez's view, the "centerpiece" of the prosecutor's argument was the "misleading suggestion that the first shot did not kill [Noe], but only rendered him unconscious, and, as appellant sat there in the presence of his 'unconscious' friend, he decided to kill him and then fired the fatal shot." He insists that by "drawing a critical distinction between the consequences of the first shot and the second, the prosecutor mischaracterized the evidence."

c. *Applicable legal principles*

"In California, the law regarding prosecutorial misconduct is settled: 'When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it

involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.' [Citation.]" (*People v. Masters* (2016) 62 Cal.4th 1019, 1052.) To preserve a claim of prosecutorial misconduct, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. (*People v. Linton*, *supra*, 56 Cal.4th at p. 1205.)

When a claim of misconduct is based on the prosecutor's comments before the jury, we consider whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Woodruff* (2018) 5 Cal.5th 697, 755; *People v. Adams* (2014) 60 Cal.4th 541, 568.) We consider the challenged statements in context, and view the argument as a whole. (*People v. Covarrubias*, *supra*, 1 Cal.5th at p. 894; *People v. Valencia* (2008) 43 Cal.4th 268, 304.) It is misconduct for a prosecutor to misstate or mischaracterize the evidence, or to refer to facts not in evidence. (*People v. Thomas* (2011) 51 Cal.4th 449, 494; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353.)

d. *Forfeiture*

Perez did not object to the challenged portions of the prosecutor's argument. Nothing in the record suggests objections would have been futile, or admonitions inadequate to cure any purported harm. Accordingly, his prosecutorial misconduct claim has been forfeited. (*People v. Williams* (2016) 1 Cal.5th 1166, 1188; *People v. Covarrubias*, *supra*, 1 Cal.5th at pp. 893–894.) Recognizing this, Perez contends his counsel provided ineffective assistance by failing to object. To establish ineffective assistance, a defendant has the burden to show counsel's representation fell below an objective standard of reasonableness under prevailing

professional norms, and there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*People v. Bell* (2019) 7 Cal.5th 70, 125-126; *People v. Brown* (2014) 59 Cal.4th 86, 109.)

e. *The prosecutor did not mischaracterize the evidence*

Perez's claim fails because the prosecutor did not mischaracterize the evidence. First, the prosecutor did not state, expressly or impliedly, that a substantial period of time passed between the two shots. Perez's interpretation of the record on this point is untenable.

Second, the prosecutor did not misstate the evidence by arguing that the first shot did not kill Noe. Viewed in context, the prosecutor simply reiterated what the defense expert said: that when the second shot was fired, Noe was still alive, based on the presence of hemorrhaging at both wound sites. Reasonable jurors would not have understood the prosecutor to mean that the first shot only wounded Noe, and Perez committed the murder only by firing the second shot. (See *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 894 [we do not lightly infer that the jury drew the most, rather than the least, damaging meaning from the prosecutor's statements]; *People v. Shazier* (2014) 60 Cal.4th 109, 144.)

Nor did the prosecutor commit misconduct by arguing that the fact Perez fired twice supported a finding of premeditation and deliberation. Prosecutors have " ' "wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]" ' [Citation.]" (*People v. Sandoval* (2015) 62 Cal.4th 394, 439;

People v. Ellison, *supra*, 196 Cal.App.4th at p. 1353.) There were two separate wounds to Noe's head, one behind his ear and one to the back of his head. Certainly, it was a reasonable inference that after firing the first shot, Perez chose to lift the gun again, point it at Noe's head, and pull the trigger, and that such actions required some contemplation; at the very least, Perez had to reposition the gun and take aim before firing the second shot. That Perez fired not one, but two, shots with precise placement tended to show he acted according to a predetermined design. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1293 [manner of killing suggested premeditation and deliberation where victim was strangled into unconsciousness before her throat was cut, and the wound to her throat required two independent cuts or a single cut in which the knife was raised and pivoted midway through]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 [defendant shot victim in the head four times; although victim was already dead, a reasonable jury could have construed these shots as a "coup de grâce" to a fatal attack effected with a calculated design to kill].) That the two shots were likely fired close in time did not preclude the prosecutor's argument. As noted, " '[t]he true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citation.]" (*People v. Potts* (2019) 6 Cal.5th 1012, 1027; *People v. San Nicolas* (2004) 34 Cal.4th 614, 658—659 [planning involving premeditation requires "nothing more than a 'successive thought[ ] of the mind' "].) Contrary to Perez's argument, the prosecutor never suggested that "even if the first shot resulted from a sudden and rash quarrel, appellant's decision to fire the second and fatal shot was the product of deliberation."

Our review of the prosecutor's entire argument reveals no mischaracterization of the evidence and no misconduct. Because the prosecutor did not mischaracterize the evidence, defense counsel was not remiss for failing to object. "Failure to raise a meritless objection is not ineffective assistance of counsel." (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90; *People v. Thompson*, *supra*, 49 Cal.4th at p. 122.)

5. *Senate Bill No. 620 resentencing*

The jury found Perez personally and intentionally used and discharged a firearm, causing Noe's death, within the meaning of section 12022.53, subdivisions (b), (c), and (d). When the trial court sentenced Perez in August 2017, imposition of a section 12022.53 firearm enhancement was mandatory, and the trial court lacked discretion to strike it. (See *People v. Franklin* (2016) 63 Cal.4th 261, 273.) Accordingly, the trial court imposed a consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d), for the firearm enhancement. It stayed the subdivision (b) and (c) enhancements pursuant to section 654.

Effective January 1, 2018, the Legislature amended section 12022.53, subdivision (h) to give trial courts authority to strike section 12022.53 firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.) Perez contends his case must be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements. We agree. The amendment to section 12022.53 applies to cases, such as appellant's, that were not final when the amendment became operative. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306; *People*

v. Nasalga (1996) 12 Cal.4th 784, 792; *In re Estrada* (1965) 63 Cal.2d 740, 745.)

The People argue that remand is unnecessary because the trial court's comments at sentencing indicated it would not have stricken the enhancement even if it had possessed discretion to do so. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713—714.) At sentencing, the court stated: "Well, there's not much leeway in a case like this. The legislature has determined what the penalties are and I have no discretion. But, if I did have discretion, I think the sentence that's mandated by law is also the appropriate sentence. [¶] So, as to count 1 . . . [i]t is a mandatory 25 years to life in the state prison. [¶] As to the [section] 12022.53(d) allegation, it is a consecutive 25 years to life. So it is a total of 50 years to life." The People urge that the court's comment provides a clear and unequivocal indication it would not have stricken the firearm enhancement.

Despite the court's comment, we believe remand is appropriate to allow it to exercise its discretion in the first instance. In *People v. Billingsley* (2018) 22 Cal.App.5th 1076, for example, the trial court observed at sentencing that it lacked discretion to strike a section 12022.53 enhancement, and stated "quite frankly, this is not the kind of case [in which] I would stay the gun allegation." (*People v. Billingsley*, at p. 1080.) *Billingsley* nonetheless remanded for resentencing, explaining: "although the court suggested it would not have stricken the firearm enhancement under section 12022.53, subdivision (c), even if it had that discretion, the court was not aware of the full scope of the discretion it now has under the amended statute.
' "Defendants are entitled to sentencing decisions made in the

exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." ' [Citation.]" (*Id.* at p. 1081; see *People v. Johnson* (2019) 32 Cal.App.5th 26, 69 [remanding for resentencing "out of an abundance of caution" even though trial court had not been sympathetic to either defendant at sentencing]; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110—1111; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425—428.) We agree with the foregoing authorities that remand is required. We express no opinion about how the trial court should exercise its discretion on remand.

DISPOSITION

Perez's sentence is vacated and the matter is remanded for resentencing to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 12022.53 firearm enhancements pursuant to section 12022.53, subdivision (h). The judgment of conviction is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.